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# Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 137.

F. WINDSOR ROBINSON, as Receiver, &c.,
Plaintiff in Error,

AGAINST

THE SOUTHERN NATIONAL BANK OF NEW YORK,
Defendant in Error.

## BRIEF FOR DEFENDANT IN ERROR.

### Statement.

This cause comes before this Court on a writ of error on behalf of the plaintiff to review a judgment rendered in the United States Circuit Court of Appeals for the Second Circuit, affirming a judgment in favor of defendant rendered in the Circuit Court of the United States for the Southern District of New York after a trial before his Honor Judge LACOMBE and a jury. A verdict was directed on the trial in favor of the defendant.

The opinion of the U. S. Circuit Court of Appeals is reported 94 Fed. Rep., 22.

## Facts.

This is an action at law, brought by the plaintiff, as Receiver of the State National Bank of Vernon, Texas, to recover the sum of $18,000 and interest upon an alleged liability of the defendant The Southern National Bank of New York as a stockholder of the State National Bank of Vernon, Texas, for the debts of that bank.

There was no dispute upon the trial as to the facts.

The complaint sets forth and the answer admits the following facts :

The State National Bank of Vernon, Texas, is a national banking association organized under the laws of the United States. On the 20th of January, 1893, one W. G. Curtis was the owner of 180 shares of the capital stock of the State National Bank, of the par value of $100 each, which stood in his name on the books of the bank, and for which he held the usual certificates. On that day one A. U. Thomas and the said Curtis gave their promissory note for value to the defendant The Southern National Bank for $15,000, payable four months after date. The note recited that the makers of the note had "deposited with said bank, as collateral security for payment of this or any other liability or liabilities of ours to said bank now due or to become due, or that may be hereafter contracted, the following property, viz.: One hundred and Eighty (180) shares of the capital stock of the State National Bank of Vernon, as evidenced by Ctf. No. 97, 150 shs., Ctf. No. 98, 30 shs., the market value of which is now $18,000."

The note also gave the powers usually contained in a stock note in case of default in payment to sell the securities at public or private sale, with the right on the part of the bank to become the purchaser thereof at such sale. The note was not paid when due (see pp. 5 to 13 of Record).

The following facts were stipulated and agreed on the trial :

On the 1st of August, 1893, the defendant notified Curtis and Thomas by telegraph that the stock would be sold on the 8th of August, 1893. On the 7th of August, 1893, it advertised in the New York papers, where such things are usually advertised, that the stock would be sold at noon on the 8th of August, 1893. On the 8th day of August, 1893, at noon at the Public Exchange in New York the stock was put up for sale at public auction and was struck off to the defendant for the sum of $20, the defendant being the highest bidder and that being the highest sum bid for it. The defendant then paid the auctioneer the $20 and afterwards received back from him that sum less his fees. That was the place where and the way in which sales of collateral to such notes were then made in New York.

These facts were admitted "without prejudice to the right of either party upon the trial to introduce oral proof as to the terms and circumstances of the sale, and without prejudice to defendant's claims as to the legal effect of the said purchase and sale" (pp. 18, 19).

It is alleged in the complaint and admitted in the answer and was proved on the trial that *the certificates for the stock "have not been transferred upon the books of the Bank of Vernon, Texas"* (pp. 9, 12, and 86 of Record).

The former cashier of the Southern National Bank, Mr. Abrahams, was called as a witness for the defendant upon the trial, and testified that he was the cashier of The Southern National Bank, the defendant, in the years 1893, 1894, and up to March, 1895, and as cashier was familiar with the transactions connected with the loan to Curtis and Thomas upon the stock of the Vernon National Bank of Texas. He further testified that at the time of the sale of the collateral, and at the time of the nominal purchase for $20, it was not the intention of the officers of the bank to take title adversely to the pledgors, the purpose of the sale being

to make it the introduction to the suit for the loan of money due the bank (p. 86). *The defendant never received any dividend upon the stock, and never voted upon the stock* (p. 87).

The State National Bank of Vernon suspended on or before the 21st day of July, 1893, and was in possession of the United States Bank Examiner until September, 1893, when it was opened for business, and continued to transact business as usual until the 18th of August, 1894, when it finally closed, and the plaintiff was subsequently appointed Receiver (p. 9 of the Record).

On the 15th of February, 1894, a letter was written by Mr. Abrahams, as cashier of the defendant bank, to A. U. Thomas, one of the makers of the note, in which he says:

"We never had any disposition to oppress you. *All that we wanted and now want is the money owed us by Mr. Curtis and yourself. When that is paid under the terms of your note the collaterals will be surrendered by us.* We manifested in every proper way a disposition to help you, and it was only when you failed to meet us that we were forced to resort to legal measures. If you will furnish a purchaser for the stock at 75 or 80 cents on the dollar, the price suggested by you in a former letter, and will carry out the rest of your proposition, I should be willing to recommend to our Board to accept it" (pp. 82, 83).

At the time this letter was written the State National Bank of Vernon was carrying on business (see Paragraph V. of Complaint, at p. 9).

Again on September 27, 1894, Mr. Abrahams, the cashier of the bank, wrote to R. P. Elliot, of Vernon, the attorney of The Southern National Bank, as follows:

"At present I may say in reply to your question 'What do you want with the stock?' that *we do not want the stock and never have wanted it.* We attempted to sell the stock here after default of payment of the

note, as the terms of the note permitted us to do, but we virtually bid in the stock ourselves and retained possession of it. *We informed our former attorney at Vernon and tried to impress it upon him that we did not wish the stock and would give the debtors every benefit from it notwithstanding the attempted sale. If we could have held the stock against the debtors we would not have done so,* and we testified to that effect in the depositions now on file in your Courts. If the sale was not valid we still held the stock under the original terms of the note, and we were from the beginning perfectly willing for our former attorney at Vernon to take that course in the Courts. If the stock turned out to be worth anything we would get the benefit of it to the extent of our claim and any balance would belong to the debtor. The fact is our counsel here thought the attempted sale did not amount to a sale for the reason that no officer of the Bank was present with the Auctioneer and that *we simply hold the stock as collateral, as we did before the attempted sale.* We were perfectly willing that the matter should so stand in the Court at Vernon " (Record, pp. 83, 84).

The references in this letter to the proceedings in Court at Vernon related to a suit which had been brought by the Southern National Bank in the District Court of Wilbarger County, Texas, against Curtis and Thomas as makers of the note to recover the amount of the note less the nominal amount for which the collateral was bid in on the attempted sale. In the petition originally filed in that suit The Southern National Bank, through its attorney, averred that the net proceeds, amounting to $12, had been allowed as a credit on the note, and sued for the balance ; but in the shape that the case finally took The Southern National Bank expressly disclaimed any title to the note as it did in its correspondence, and took the position that the note was only held as collateral security. Mr. Abrahams, the cashier of The Southern National Bank, gave testimony by deposition in the Texas suit,

in the course of which he testified to the facts of the sale, and further testified:

"Our real object in selling the stock at public auction after due notice of sale, both by publication here and due notice to the owners of the stock, was to obtain for it the best possible price, and if necessary to purchase it ourselves, as we had a perfect right to do under the agreement contained in the note; the stock is to-day in our possession, and *we will surrender it to the owners upon receipt of amount due us*, which amount is fixed by the terms of the note" (p. 88).

The suit in Texas became very complicated by reason of the defense of an alleged compromise, and also by reason of a controversy with a former attorney of The Southern National Bank (one Thompson), who claimed title on his own behalf to the note.

*The makers of the note took the position*, by their pleading in the Texas Court, *that the sale of the stock was wrongful and void* (pp. 41 to 45).

The Southern National Bank by its third amended petition in that suit, set forth that the credit of $12 endorsed on the note was improper and incorrect, as the bank "*does not claim any right or title to said bank-stock* by reason of any attempted or pretended sale of same, but that plaintiff *now holds said bank stock as collateral security only*, as it has heretofore done, as fully stated in the said note sued on herein. That the said bank stock has at all times since the execution and delivery of the note sued on herein, been in the possession and under the control of the plaintiff, and plaintiff has always been ready and willing at any and all times, and is now ready and willing to return to defendants the said bank stock upon the payment by them of the said note here sued on by it and the plaintiff here now tenders in open Court to the said defendants the said bank stock upon the payment by them of the said note aforesaid" (p. 37).

It appears by the certificate of the Clerk of the District Court of Wilbarger County, Texas, dated

October 7, 1898, *introduced in evidence by the plaintiff in this suit*, that on the trial of the Texas suit the plaintiff The Southern National Bank of New York tendered into court and to the defendants Curtis and Thomas the certificates of stock in question, " which certificates of stock were filed by the Clerk of said Court on the 8th day of August, 1895, and have ever since remained on file in said cause in said Court and are on file at this time " (pp. 79, 80). The trial Court in that suit found the facts as to the making of the note and the depositing of the collateral security, and as to the sale of the collateral. It also found that there had been a settlement as between the plaintiff and Curtis and Thomas by allowing them sixty cents on the dollar for the bank stock. The Court, therefore, gave judgment for the plaintiff on the basis of the compromise for $5,751 and interest instead of the full amount of the note. It also found in favor of Thompson for $1,000 on his claim against the plaintiff (see pp. 59, 60). An appeal was taken to the Civil Court of Appeals of Texas, which Court held that there was no accord and satisfaction, and therefore, no valid compromise, and that plaintiff was entitled to judgment for the full amount of the note as against Thomas and Curtis. It also held that Thompson had no valid claim against the plaintiff (pp. 74 to 79). In the opinion of the Court of Appeals it is said :

" *Appellant tendered the stock in Court for Thomas and Curtis, thereby waiving its right as purchaser thereof* " (p. 78),

and after stating the conclusions of the Court the opinion states :

" We, therefore, adopt the trial Court's conclusions of fact in so far as they are not in conflict with the conclusions stated above, and reverse, and here *render judgment in favor of appellant against Thomas and Curtis for the full amount claimed, decreeing the bank stock to them as tendered* and in its favor against Thompson upon his intervention, adjudging the costs accordingly " (pp. 78, 79).

The judgment entered on the decision of the Court of Civil Appeals directed that The Southern National Bank recover from Curtis & Thomas the sum of $15,000, with six per cent. interest from the 20th of January, 1893, with costs, and it was further *ordered that the 180 shares of stock of the State National Bank of Vernon " be turned over to them [that is, Curtis & Thomas] upon payment of this judgment, as per the tender of the appellant"* (p. 81).

Upon the foregoing proof Judge LACOMBE directed a verdict for the defendant in this suit, to which direction plaintiff excepted.

The judgment entered on this verdict was affirmed on writ of error by the Circuit Court of Appeals, Judge WALLACE writing the opinion and Judges SHIPMAN and THOMAS concurring (94 Fed. Rep., 964).

## POINTS.

In our discussion of the points involved in this case we shall reverse the order in which the points are discussed in the brief for plaintiff in error.

The first assignment of error, and the one discussed in Point I. of the brief for plaintiff in error, relates to a matter of evidence; namely, to an exception taken to a question put to the witness Abrahams, a former cashier of the Southern National Bank, as to the intention of the officers of the bank at the time of the nominal purchase of the collateral. If we are right in our contention that only the registered holder of stock is liable under the statute, then this exception becomes wholly immaterial, and its discussion becomes unnecessary, as the admission of the question, even if erroneous, could not have in any way harmed the plaintiff

in error. We shall, therefore, pursue what seems to us the more logical order of argument, and shall discuss in turn the following propositions:

**I.**

The defendant in error, never having been a registered shareholder by a transfer of the stock on the books of the State National Bank of Vernon, is not liable, as a shareholder, for the debts of the bank.

**II.**

Even if, under any circumstances, one who has never been a shareholder of record can be held liable as the "real owner" of the stock, yet the undisputed testimony showed that the defendant in error was not, in any proper sense, the "real owner" of the stock.

**III.**

The first assignment of error, with regard to the question asked the witness Abrahams, is not well taken.

**IV.**

There was no disputed question of fact to go to the jury; the evidence was uncontradicted, and the trial Judge was justified in directing a verdict for the defendant on the ground that on the undisputed evidence the defendant was not the "real owner" of the stock.

**V.**

To hold the defendant in error liable, by reason of any technical or theoretical ownership resulting from the nominal sale of the collateral security, would be to subvert the rule laid down by this Court so as to work gross injustice and hardship in the case at bar.

## I.

**The defendant in error, never having been a registered shareholder by a transfer of the stock on the books of the State National Bank of Vernon, is not liable as a shareholder for the debts of the bank.**

*(a)* Counsel for plaintiff in error claims that whatever may have been the rule prior to the decision in *Pauly vs. State Loan and Trust Co.*, 165 U. S., 606, that decision has established the proposition that in all cases the "real owner" is liable as a shareholder, whether he is or has ever been a shareholder of record.

We claim that the decision in the *Pauly* case was not intended to overrule the previous decisions to the effect that only stockholders of record are liable for the debts of the bank, and that the point of the opinion and the effect of the decision in the *Pauly* case was to exonerate one who was a stockholder of record, and not to charge one who was not and never had been a stockholder of record. What the *Pauly* case decided and all that it decided, was that where stock was transferred to the name of a pledgee, and the word pledgee appeared on the books of the bank, it thus *appeared of record* that the transferee was not the "real owner" of the stock, and the transferor still remained liable. Any language used by the Court implying any broader proposition than this is purely *obiter*, and must be interpreted in the light of the facts then before the Court and in the light of the prior and subsequent decisions of this Court.

The decision of the Court relieved a registered stockholder from liability; it did not charge a non-registered stockholder with liability.

*(b)* The statutory liability is imposed by Section

5151 of the U. S. Revised Statutes, which reads as follows:

"The *shareholders* of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

The term "shareholder" is defined by Section 5139, as follows:

"The capital stock of each association shall be * * * *transferable on the books of the association.* * * * Every person *becoming a shareholder by such transfer shall*, in proportion to his shares, *succeed to all the* rights and *liabilities of the prior holder* of such shares."

The statute thus clearly limits the liability of persons as shareholders to those who have become shareholders of record.

*(c)* The rule as to statutory liability has been strictly construed by this Court as limited to stockholders of record.

In *Richmond vs. Irons*, 121 U. S., 58, it is said: "By Section 5139 of the Revised Statutes *those persons only have the rights and liabilities of stockholders who appear to be such as are registered on the books of the association*, the stock being transferable only in that way. *No person becomes a shareholder subject to such liabilities* and succeeding to such rights, *except by such transfer; until such transfer, the prior holder is the stockholder for all the purposes of the law.*"

The rule is stated as follows by Mr. Justice HARLAN in *Whitney vs. Butler*, 118 U. S., 660:

"If a person permits his name to appear and remain in its outstanding certificates of stock and on

its register as a shareholder, he is estopped as between himself and the creditors of the bank to deny that he is a shareholder. * * * His individual liability continues until there is a *transfer of the stock on the books of the bank*."

It is said in *National Bank vs. Case*, 99 U. S., 628: "One who *appears* on the books of the corporation as the owner of the stock, is liable as a stockholder," for the reason, among others, that "by taking the legal title he has released the former owner."

In *Whitney vs. Butler*, 118 U. S., 655, cited *supra*, the general doctrine is recognized that a transfer on the books is necessary before a purchaser of stock can be charged with liability as a stockholder under the statute. The liability of the former owner, "continues *until there is a transfer of the stock on the books of the bank*, even where he has in good faith previously sold it and delivered to the buyer the certificate of stock, with a power of attorney in such form as to enable the transfer to be made."

The Court, however, held that when the certificate had been actually surrendered to the bank, with a power of attorney authorizing a transfer on the books, the former owner would be relieved of liability, although an actual transfer was not made on the books. The Court held that as matter of law it was in effect transferred on the books, just as a deed delivered to the recording officer for record is in effect and as matter of law recorded, although not actually recorded on the books.

That this case did not alter the substance of the rule as to the necessity of a transfer on the books in order to charge a vendee of the stock with liability as a stockholder, is apparent from the subsequent case of *Richmond vs. Irons*, 121 U. S., 58, cited *supra*, reaffirming the proposition that "*no person becomes a shareholder subject to such liabilities * * * except by such transfer.*"

*(d)* The following cases deal with the liability of pledgees of stock.

In *Pullman vs. Upton*, 96 U. S., 328, it was held that a pledgee, who had caused stock to be transferred to his name on the books of the corporation, appearing as absolute owner, was liable as a shareholder.

The Court cites with approval *R. Co. vs. Moss*, 14 Beav., 64, saying:

"In that case it was said that *only those persons who appear to be shareholders on the register of the company are liable to pay calls.*"

The Court also cites with approval to same effect *Adderly vs. Storm*, 6 Hill, 624. In that case pledgees of stock had received certificates in their own names, the stock having been transferred to them on the books. The debt was paid in September, 1838, and the pledgees returned the certificates to the pledgor, with a power of attorney for the transfer of the stock. The re-transfer was not made, however, till March, 1840. The pledgees were held liable as stockholders of record for a debt contracted in January, 1840, "and this, it was said, would be the law, though the plaintiff may not have known, at the time he trusted the company, that the defendants could be reached."

The Court cites further, to the same effect:

*Banks vs. Burnham*, 11 Cush., 183.
*Wheelock vs. Frost*, 77 Ill., 296.
*Empire City Bank*, 18 N. Y., 200.

In *National Bank vs. Case*, 99 U. S., 628, the same principle is laid down as in *Pullman vs. Upton*, and it was further *held* that after a transfer to the name of the pledgee as owner he remains liable, notwithstanding a subsequent colorable transfer by the pledgee.

On the other hand it was held in *Anderson, Receiver, vs. Philadelphia Warehouse Co.*, 111 U. S., 479, that a pledgee of stock is not chargeable as a shareholder where he is not registered as owner.

It was further *held* that a pledgee who, "in good faith and with no fraudulent intent, takes the security for his benefit in the name of an irresponsible trustee for the avowed purpose of avoiding individual liability as a shareholder, and who exercises none of the powers or rights of a stockholder, incurs no liability as such to creditors of the bank in case of its failure."

In other words, the cases hold that, if the pledgee appears on the books of the bank as absolute owner, then he is liable as a shareholder by reason of holding himself out as such and on the ground of estoppel. But, where the record itself shows that the party to whom the certificates have been transferred is merely a pledgee, then there is no holding out by the pledgee of himself as absolute owner. There is consequently no estoppel, and the rule laid down in the *Anderson* case applies.

This is the line of reasoning of Mr. Justice HARLAN in the *Pauly* case, on which he bases his conclusion in favor of the defendant (165 U. S., pp. 622–624).

In *National Park Bank vs. Harmon*, 51 U. S. App., 148, affirmed by this Court on the authority of the *Pauly* decision, 172 U. S., 644, it appeared that a pledgee bank had caused the pledged certificates to be transferred from the name of the original pledgor to the name of one of its own employees, who was irresponsible and had no interest in the transaction. This was done after the debt had matured and after the pledgors had defaulted in payment of the debt, and after the right to sell had accrued. The pledgee bank never received any dividends and never voted upon the shares. The Court held that the pledgee bank was not liable as a stockholder of the insolvent bank.

In *Wilson vs. Merchants' Loan and Trust Company*, 98 Fed. Rep., 688, it was *held* by the Circuit Court of Appeals for the Seventh Circuit that a pledgee of

stock with a power of attorney to have the shares transferred on the books, so long as he holds the shares as security without intending to assume liability as a stockholder, cannot be treated as one and subjected to an assessment on the insolvency of the bank, although he has caused the shares to be transferred to a third person under an agreement that they are still to be held as security for the debt.

The facts were that the defendant held shares of stock in a national bank as collateral security. The bank was subsequently consolidated with another national bank, and stock of the latter was issued in lieu of stock of the former. Defendant surrendered the shares it held, and caused stock in the consolidated bank to be issued in lieu thereof in the name of an employee, but continued to hold the same as security for the original debt.

The Court cites the decision in *Anderson vs. Warehouse Company* and also the decision in *Pauly vs. Loan and Trust Company* as authority.

So, in *Frater, Receiver, vs. Old National Bank of Providence*, 101 Fed. Rep., 391, the Circuit Court of Appeals for the First Circuit holds that it is only in clear cases that a pledgee on the ground of estoppel can be subjected to liability for an assessment on national bank stock. In that case it appeared that the stock stood upon the books of the bank in the name of a person as cashier of another national bank, and the Court held that the designation suggested a qualified or representative holding, which put all persons on inquiry, and the bank of which the holder was cashier is not estopped to show that it held the stock as collateral only—at least, in the absence of evidence that the insolvent bank or its creditors in fact acted in reliance on its supposed ownership.

*(e)* The latest decision of this Court on the subject of stockholders' liability, *Matteson vs. Dent*, 176 U. S.,

521, reaffirms the rule that the "legal owner" of stock remains liable so long as the stock stands in his name.

The Court thus states certain exceptions to the rule (per Mr. Justice WHITE, at p. 531):

"1. Where a transfer has been fraudulently or collusively made to avoid an obligation to pay assessments such transfer will be disregarded and the real owner will be held liable. *Germania National Bank vs. Case*, 99 U. S., 628, 631, 632; *Bowden vs. Johnson*, 107 U. S., 251, 261.

"2. Where a transfer of stock is made and delivered to officers of a bank, and such officials fail to make entry of it, the acts referred to will operate a transfer on the books and extinguish the liability as stockholder of the transferer (*Whitney vs. Butler*, 118 U. S., 655). In the case just cited in applying the exception the Court very carefully and accurately restated the general rule.

"3. *Where stock was transferred in pledge and the pledgee* for the purpose of protecting his contract *caused the stock to be put in his name* on the books *as pledgee* it has been held that *such a registry did not amount to a transfer* to the pledgee as owner, and that *he therefore was not liable although the pledgor might continue to be so (Pauly vs. State Loan and Trust Co.*, 165 U. S., 606).

"*These and other cases unnecessary to be referred to do not impair, but, on the contrary, serve to prove the general rule.*"

While these exceptions operate to charge a stockholder, who has been a stockholder of record, notwithstanding the transfer to another on the books of the bank, no case in this court has ever held a stockholder liable as such whose name never appeared upon the books. The *Pauly* case certainly does not so hold, nor was it so interpreted by this Court in its subsequent decisions in *National Park Bank vs. Harmon* and *Matteson vs. Dent, supra.*

*(f)* The "general rule" is stated in Thompson's Commentaries on the Law of Corporations, Sections 3283–4 :

"Every person whose name by his authority has been *placed on the books* of a corporation as a shareholder, is such, both as to the corporation and to its creditors so long as his name remains there. He may hold the shares as Trustee for others or for the Company itself or as collateral security for money loaned ; and yet he is personally liable as a shareholder, and if he suffers loss in consequence of his position, he must seek indemnity from the equitable owner. So although he may have sold his shares to another and received pay for them and delivered to the purchaser his certificate—yet *until the transfer has been perfected by registering the transfer on the corporate books* as required by the charter, statute, articles of association or deed of settlement governing the company, *the transfer*, though valid as between him and the transferee, *does not divest his liability as a shareholder* to the company or to its creditors. The registration being intended in part for the protection of the public, one who has parted with his shares, and yet suffers his name to remain on the register, remains a stockholder by conduct or estoppel."

In *Stufflebeam vs. De Lashmutt*, 83 Fed. Rep., 449, the Court says :

"The liability thus held to exist is, as will be seen, upon the principle of an estoppel by which a person who has held himself out as a stockholder of a corporation will not be allowed to escape the liability that attaches to him in that relation as against persons who dealt with the corporation upon the strength of his relation to it as a shareholder."

The Court, accordingly, *held* that where a person had been induced to purchase stock by fraud, and had been registered as transferee on the books of the bank, but had promptly, on discovery of the fraud, repudiated the sale and the transfer, he was not liable as a

shareholder, it not being shown that any creditor had known of or relied upon the apparent ownership shown by the books of the bank.

See further decision in this case, 101 Fed. Rep., 367.

See, also, *Wallace vs. Bacon*, 86 Fed. Rep., 553.

*(g)* The cases in the lower Courts cited by counsel for plaintiff in error, do not support his contention.

The case of *Hubbell vs. Houghton*, 86 F. R., 547; affirmed in 91 F. R., 453, was a case where shares in a national bank were bought for defendant by his agent and registered in the name of the agent and were never put in the defendant's name. The agent was an irresponsible person and did not get any benefit of the stock. It was held that the defendant was liable. The purchase was actually completed by entering the stock on the books of the company, which is not the case where no transfer is ever registered.

The legal identity of agent and principal might justify this decision on the ground that the registry in the name of the agent was in law a registry in the name of the principal.

This decision is, however, inconsistent with the decision in *National Park Bank vs. Harmon*, 51 U. S., App. 148; 172 U. S., 644, cited *supra*.

The opinion of Judge PUTNAM in the Circuit Court in this case of *Hubbell vs. Houghton*, 86 Fed. Rep., p. 533, says :

"Here there was no sale between the holders of record and the defendant. They had been his agents, and for all the purposes of this case they were substantially the same as he, and as against the rights of the creditors of the bank the fact that the stock stood in their names on its books and not in his ought to be regarded of the very least importance." "We limit our decision to the precise case presented to us."

The case of *Davis vs. Stevens*, 17 Blatchford, 259, much relied upon by counsel for defendant in error

is similar, except that in that case the person whose estate was held liable had been a stockholder of record. It appeared that on the 29th of October, 1870, one Calvin Stevens, the defendant's testator, appeared on the books of the bank as a shareholder to the amount of 117 shares. On that day he caused these shares to be transferred to one Elston, an irresponsible person and a porter in the office of his New York broker. Subsequently, he made other purchases of the stock of the bank and sometimes made sales. His purchases were put to the credit of Elston on the stock books, and, to meet his sales, he, acting as the agent of Elston under a power of attorney for that purpose, caused the necessary transfers to be made from the same account. On the 22d day of February, 1871, there stood to the credit of Elston on the books 161 shares, for which a formal certificate was issued in his name and delivered to Stevens as his agent. The account on the books remained unchanged from that time until the failure. The Court held the estate of Stevens liable, saying:

"So far as Elston was concerned, the transfer to him was colorable only; and it is apparent that the only object Stevens had in causing it to be made was to conceal his ownership, and thus, if possible, escape all statutory liability. Such being the case, I am unable to see how he can occupy any different position from what he would if the stock had been taken directly from his own name on the books and put in that of Elston. He is still the real owner, with Elston as his agent, specially authorized to hold for him the legal title. Every principal is responsible for the obligations of his agency. The debt of the agent is the debt of the principal. By the rules of law which govern the relation of principal and agent, the registry on the books in the name of Elston was, as between Stevens and Elston, in legal effect, the same as registry in the name of Stevens. The obligations which Elston assumed by reason of such registry were the obligations of Stevens."

These cases are quite distinct from the case at bar, and furnish no authority for holding a vendee of stock liable who has not become a stockholder of record. In such a case as this the doctrine of principal and agent does not apply.

*Case vs. Smith*, 10 Fed. Rep., 722, was also a case where the party held liable was really the undisclosed principal, while the stockholder of record was only a fictitious shareholder.

The cases of *Snyder vs. Foster*, 73 Fed. Rep., 136, and *Earle vs. Coyle*, 95 Fed. Rep., 99, cited by counsel for plaintiff in error in his brief, are almost identical in their facts. In both cases the cashier of the bank became the purchaser of shares of stock in his own bank. In both cases the purchaser received the certificates from the vendor. In both cases he neglected to have the transfer made. The Court held the vendor released from liability although still a stockholder of record, following *Whitney vs. Butler*, 118 U. S., 655.

The case of *Young vs. McKay*, 50 Fed. Rep., was also a similar case to that of *Whitney vs. Butler*, the stock having been delivered by the broker for the vendor to the cashier of the bank for transfer, who failed to transfer it to the name of the vendee.

*(h)* An extreme case where this Court exonorated from liability a stockholder of record is *Concord First National Bank vs. Hawkins*, 174 U. S., 364, In this case it appeared that the First National Bank of Concord, N. H., had invested a part of its surplus funds in the stock of the Indianapolis National Bank of Indianapolis. The Court held that this was an act which it had no power or authority in law to do, and, as the investment was an unlawful one, the Concord Bank was not liable as a stockholder of the Indianapolis Bank.

This case, as we have said, is an extreme one in the direction of relieving from liability a transferee who has become a stockholder of record.

The case of *Whitney vs. Butler*, and other cases already cited, illustrate the converse proposition where transferors, although still stockholders of record, are exonerated from responsibility.

The case of *Stewart vs. Hayden*, 169 U. S., 1, illustrates a third condition of affairs, where the Court refused to recognize a transfer as valid because fraudulently made by the transferor, the Court there holding that one who is a holder of national bank stock, the bank being at the time insolvent, cannot escape the individual liability imposed by the statute by transferring his stock with intent to avoid that liability, knowing or having reason to believe that, at the time of the transfer on the books of the bank, it is insolvent or about to fail. This proceeds upon the principle that such a transfer is fraudulent, and, hence, a nullity, and is in line with the previous decisions of *National Bank vs. Case*, 99 U. S., 628, and *Bowden vs. Johnson*, 107 U. S., 251.

It still remains true, however, as we have several times remarked already, that there is no case in this Court holding one liable as a stockholder, who is not or has not been a stockholder of record, and no case in the lower Courts, except where the doctrine of principal and agent applies.

*(i)* The argument *ab inconvenienti* against departing from the rule limiting liability to those who are stockholders of record is a very grave one. So long as the statutory test is adhered to, and the record is taken as the only and conclusive evidence of liability, except where special circumstances exist as between the transferor and transferee, the Receiver of an insolvent bank has a plain and simple duty to perform. If, however, the real ownership of stock is to be inquired into in every case, parol evidence at once becomes competent

to determine this question, and a Receiver is launched upon a sea of investigation and controversy where disputed questions of fact arise without number, and where issues of veracity between opposing witnesses, requiring the verdict of a jury to settle disputes of fact, would render the winding up of a national bank an affair of complication involving expensive litigation. We submit that the exceptions already recognized by this Court should not be enlarged. The policy of the law is to expedite the winding up of the affairs of insolvent banks and to reduce to the minimum the subject matter of litigation by or against Receivers.

*(j)* If we have succeeded in establishing to the satisfaction of the Court the proposition thus far discussed and insisted on, namely, that only a registered holder of shares is liable, and that the question of real ownership arises only as between two or more registered holders, there is no need to discuss the other questions raised by the record, since the fact is conceded that the defendant in error never was a stockholder of record in the National Bank of Vernon. If, however, this Court takes the view that one who is not and never has been a stockholder of record, may be made liable under the statute, then we insist that upon the undisputed evidence the defendant was not the "real owner" of the stock, and hence is not liable.

## II.

**In any view of the law, and even if one not a stockholder of record can be held liable as the real owner, the undisputed facts in this case show that the defendant in error was not in any proper sense the**

**"real owner" of the stock either in fact or in law.**

The history of the dealings with this stock as shown in the statement of facts at the commencement of this brief clearly shows that the bidding in of the stock at the auction sale was purely a formal matter as a preliminary to the commencing of suit upon the note; that there was never any intent on the part of the Southern National Bank to become the absolute owner of the stock, nor to cut off the equity of redemption of the pledgors; that it intended at the time of the auction sale to continue to occupy the position of pledgee merely and not that of absolute owner of the stock; that it so notified one of the makers of the note while the Texas Bank was carrying on business and subsequently so notified its own attorney in Texas; that it took that position upon the trial of the suit in Texas which it brought against the makers of the note; that it tendered the stock in court and deposited the certificates in court in that suit, and that in the final judgment rendered on the decision of the Civil Court of Appeals in Texas it was adjudged by that Court that the makers of the note should pay the full amount of the note with interest, and upon so paying should be entitled to receive the stock as tendered.

The bank, therefore, waived any claim to be the owner of the stock, and declined to accept the benefit or assume the burdens of such ownership.

The stock was never transferred on the books to The Southern National Bank; that bank never voted upon it, nor accepted any dividends on it.

Consequently, the defendant in error is not the "real owner" of the stock within the meaning of the *Pauly* decision, but, on the contrary, is entitled to the benefit of the rule laid down by the *Pauly* decision to the effect that the pledgor is the real owner.

Even if this stock had been transferred on the books to the defendant in error, it would be entitled to be exonerated from liability under the rule laid down in the *Pauly* case.

The facts of this case bring it clearly within the decision in *National Park Bank vs. Harmon*, 51 U. S. App., 148; 172 U. S., 644, more fully discussed *supra*.

In this case as in that, "the defendant never became the |real| owner of the shares, but remained, as it always had been, merely the pledgee thereof."

It appears conclusively by the evidence that defendant not only bid in the property for the benefit of the pledgors, but that it asserted no adverse title on its own behalf, waived any rights which it might have acquired by the nominal purchase, notified the "real owners" that the stock was still held for their benefit and as collateral security for the loan, and that it would be delivered to them upon payment of the loan.

It also appears that the pledgors themselves repudiated the sale of the collateral, and claimed by their pleading in the Texas suit that the sale was wrongful and void as to them, and claimed damages as for a conversion.

It further appears that the stock was tendered to the pledgors in open court in the Texas suit, was deposited in court, where it still remains, and that by the final decree of the Civil Court of Appeals in Texas it has been adjudged to belong to the pledgors and to be deliverable to them upon payment in full of their promissory note.

Under these circumstances, we again repeat, "the defendant never became the [real] owner of the shares, but remained, as it always had been, merely the pledgee thereof," and hence is not liable as a shareholder.

## III.

**The first assignment of error with regard to the question asked the witness Abrahams is not well taken.**

The question was:

"Q. At the time of the sale of that collateral security and at the time of the nominal purchase for $20, was it the intention of the officers of the bank to take title adversely to the pledgors?"

If we are right in our main contention of law that only a registered shareholder is liable, then any error in the exclusion or admission of testimony becomes wholly immaterial and can have done no harm to the plaintiff in error, since we were entitled to a verdict by direction of the Court upon the conceded fact that the defendant never was a shareholder of record.

If, however, we are wrong on this proposition, then the question of real ownership became the vital question in the case, and any testimony throwing light on the question of whether the ownership was real "or merely nominal" was competent and material. The intention of the defendant in error as to becoming the owner of the stock to the exclusion of the rights of the pledgor was one of the facts throwing light upon this question. The cashier of the bank, who was familiar with the transactions at the time, and who is the officer of the bank who conducted the correspondence put in evidence as further throwing light on the intention of the defendant in error, was the proper party to testify as to the intent with which the nominal purchase of the stock was made in the name of the defendant in error.

"Wherever a witness' intent is relevant, he may be examined as to it."

Wharton on Evidence, § 955.

" Where a party is examined as to his conduct he may be asked as to his motive, his testimony as to such motive being based not on inference but on consciousness."

Wharton on Evidence, § 508.
*Ibid.*, § 482.
*Thurston vs. Cornell*, 38 N. Y., 281.
*Manufacturers' and Traders' Bank vs. Koch*, 105 N. Y., 630.

The cases cited by counsel for plaintiff in error on pages 7 and 8 (under Point I.) of his brief are not applicable to the situation in this case.

This was not a purchase from the pledgors, nor was it a purchase by an agent on behalf of an undisclosed principal, as in the case of *McComb vs. Wright*, 4 Johns. Ch., 659 (cited by counsel for plaintiff in error).

It was a nominal sale *by the pledgee* for the mutual account of the pledgors and the pledgee. There being no outside bid, the pledgee nominally bid in the stock for a trifling amount.

Surely, the pledgee was at liberty to waive the nominal title thus acquired and to notify the pledgors, as it did, that it still held the stock merely as collateral. To hold otherwise would be to subordinate the substance of the transaction to the form.

In any event, however, and even if this question were regarded, in any aspect of it, as improper, no harm has resulted therefrom to the plaintiff in error, for the reason that the other undisputed facts of the case showed, as matter of law, that the defendant in error was not in any proper sense the " real " owner of this stock, and hence we were entitled to a verdict by direction of the Court on that question, and, as there was no issue of fact to go to the jury, no harm resulted to the plaintiff in error by the admission of this question and answer, even if incompetent in itself considered.

## IV.

**There was no disputed question of fact to go to the jury. The evidence was uncontradicted, and the trial Judge was justified in directing a verdict for the defendant on the ground that on the undisputed evidence the defendant was not the "real owner" of the stock.**

We have already discussed this subject under Point II. We showed upon the trial the history of the transactions with regard to this stock. The testimony consisted, in the main, of documentary evidence, letters from the defendant's cashier, and the records of the Texas Courts. No exception is taken to the competency or materiality of that testimony. The evidence of the cashier of the defendant bank was also given. No evidence to the contrary was introduced on behalf of the plaintiff. Even if there were any question of the credibility of the oral testimony, there was no sufficient question to go to the jury, as we could afford to disregard the oral evidence and rely entirely on the documentary evidence. The letter of defendant's cashier to the makers of the note and pledgors of the stock on February 15, 1894, is, of itself, sufficient to establish the proposition that the Southern National Bank did not claim ownership, but treated the stock as still held as collateral. At the time when this letter was written, the Vernon National Bank was solvent. It had, it is true, previously suspended business, but, at the date of this letter, it had resumed business and did not go into the hands of a Receiver until the following August. In this letter the cashier of the Southern National Bank says to Mr. Thomas, one of the makers of the note: "All that we wanted, and now want, is the

money owed us by Mr. Curtis and yourself; when that is paid, under the terms of your note, *the collateral will be surrendered by us.*" The certificates of stock were subsequently tendered to the pledgors and deposited in Court in Texas, where they still remain as the property of the pledgors under the judgment as finally declared by the Civil Court of Appeals of Texas in the suit brought by the Southern National Bank against Curtis and Thomas, the makers of the note for which the stock was pledged as collateral. It thus appears that the essential facts with regard to this matter were not only proved without contradiction, but that they were in their nature incapable of contradiction. There was, therefore, nothing to go to the jury, and the Court properly directed a verdict for the defendant in error.

## V.

**To hold the defendant in error liable, by reason of any theoretical or technical ownership resulting from the nominal sale of the collateral security, would be to subvert the rule laid down by this Court so as to work gross injustice and hardship in the case at bar.**

To hold the defendant in error liable as a shareholder because of the nominal sale of the collateral, and thus throw upon the defendant in error, which has already lost $15,000 by the failure of the makers of the note to meet their obligation, the additional loss of $18,000 and interest, is to subvert the rule in the *Pauly* case from one intended to accomplish substantial justice into one which would work gross injustice.

If the *Pauly* decision means anything, it means that the technical ownership of stock shall not be the test of liability, but the real and substantial ownership, and that one who is in fact a pledgee shall not be held liable as if he were the absolute owner, unless he has held himself out to the world as the absolute owner by having the stock transferred to him as owner on the books of the bank.

As Mr. Justice HARLAN says in the *Pauly* case: "And, let it be observed, the liability upon shareholders is to the extent of the amount of their stock at the par value thereof, 'in addition to the amount *invested in* such shares.' The word 'invested' plainly has reference to those who originally or by subsequent purchase become the real owners of the stock, and *cannot refer to those who* never invested money in the shares, but *only received the certificates* of stock, *or it may be the legal title thereto, as collateral security* for debts or obligations already or to be contracted" (165 U. S., 621).

## VI.

**The judgments of the Courts below were correct, and should be affirmed.**

WM. B. HORNBLOWER,
Of Counsel for Defendant in Error.